

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 May 2004

CASE NO.: 2004 SOX 20

In the Matter of

COLIN M. HARVEY
Complainant

v.

THE HOME DEPOT, INC.
Respondent

Appearances: Mr. Colin M. Harvey
Pro Se

Ms. Leslie M. Turner, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**INITIAL DECISION AND ORDER-
DISMISSAL OF UNTIMELY DISCRIMINATION COMPLAINT**

In his November 21, 2003 SOX complaint, Mr. Harvey alleged Home Depot terminated his employment on August 14, 2002 in retaliation for activities protected under Section 806 of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A, (“Act” or “SOX”) as implemented by 29 C.F.R. Part 1980 (Interim Final Rule, 68 Fed. Reg. 31860, May 28, 2003). According to the statute of limitations in 18 U.S.C. § 1514A (b) (2) (D), as implemented by 29 C.F.R. § 1980.103 (d), a complaint “shall commence not later than 90 days after the date on which the violation occurs.” After receiving the Respondent’s request that Mr. Harvey’s complaint be dismissed as untimely, I issued a Show Cause Order on February 5, 2004, directing the parties to address several issues relating to whether Mr. Harvey’s SOX discrimination complaint should be dismissed as untimely. Both parties have subsequently replied to the order.

Background

Procedural History

On November 24, 2003, the Regional Administrator, U.S. Department of Labor, (“DOL”), received Mr. Harvey’s November 21, 2003 SOX complaint. On December 19, 2003, after consideration by the Occupational Safety and Health Administration (“OSHA”), the

Regional Administrator advised Mr. Harvey that his SOX complaint was untimely because he did not file it within 90 days of his discharge from Home Depot as required by the Act. He also informed Mr. Harvey that the June 28, 2002 Notice of Discharge he received from Home Depot occurred prior to enactment of SOX.

On January 6, 2004, Mr. Harvey appealed the Regional Administrator's adverse determination to the Chief Administrative Law Judge, Office of Administrative Law Judges ("OALJ"), DOL.¹ In his appeal, Mr. Harvey first noted that although he received the initial notice of his discharge on June 28, 2002, he was not actually terminated until August 14, 2002,² after enactment of SOX. Within 90 days of his termination, Mr. Harvey filed employment discrimination complaints with the Secretary of Labor, the Deputy Attorney General of the United States, and the Securities Exchange Commission ("SEC"). In these complaints, Mr. Harvey claimed the company CEO had made undisclosed purchases of expensive cars for several executives. Mr. Harvey also asserted Home Depot was inaccurately accounting for large losses in "unaccounted inventory" in its financial disclosures. Further, Mr. Harvey claimed to have disclosed the co-mingling of company and personal funds when a company executive purchased real estate and associated securities. Mr. Harvey concluded his appeal by explaining that he made his November 2003 complaint due to the on-going issues of fraud with the company. He then repeated the allegations in that complaint.

On January 21, 2004, having been assigned to render a decision in this case, I set a hearing date of February 17, 2004 for this case in Washington D.C.

In her February 2, 2004 response to the hearing notice, counsel for Home Depot asserted Mr. Harvey's SOX complaint was time barred and requested that his complaint be dismissed. In light of the multiple documents³ and assertions Mr. Harvey presented, and Home Depot's request to dismiss the complaint, I canceled the scheduled hearing and issued the February 5, 2004 Show Cause Order.

¹The appeal was received by OALJ on January 15, 2004.

²As highlighted by the Regional Administrator, if Mr. Harvey's termination in mid-August 2002 was initiated by this alleged June 28, 2002 termination notice, then SOX protection would not be available. Usually, the notice of an intended separation, rather than the actual separation, is considered the adverse action for purposes of the statute of limitations. See *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 855 (3d Cir. 2000), citing *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) ('[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful'). Thus, if the June 28, 2002 notice was directly linked to the August 2002 termination, Mr. Harvey's complaint would fail since SOX did not become effective until July 30 2002. However, since Home Depot based Mr. Harvey's August 14, 2002 termination on his alleged abandonment of his job, I am proceeding with the adjudication of this dismissal motion on the premise that the June 28, 2002 notice did not precipitate, and was not directly related to, the August 14, 2002 separation action.

³Mr. Harvey has submitted 27 exhibits (marked "A" through "Z" plus one document labeled "1") as part of his pre-hearing submission. In response to the Show Cause Order, Mr. Harvey has presented another 15 documents (marked "A-1" through "O-1"). I will identify references to Mr. Harvey's exhibits, as CX (complainant exhibit). In response to the Notice of Hearing, counsel for Home Depot attached two documents marked "A" and "B." In counsel's Show Cause response, she attached another document marked "A." I will label this exhibit as "C." The prefix for three Home Depot submissions will be RX (respondent exhibit).

Mr. Harvey's Home Depot Employment

In October 1993, Mr. Harvey started working as an employee of Home Depot in Maryland. After failing to receive a promotion, Mr. Harvey filed a complaint of racial discrimination with the Equal Employment Opportunity Commission ("EEOC") in April 2000. About a year later, in April 2001, Mr. Harvey entered into a settlement contract with Home Depot regarding his discrimination complaint (CX R). As part of the arrangement, Mr. Harvey received some stock options and a promotion to the Atlanta Store Support Center ("SSC") (CX J-1).

After about one year in Atlanta, Mr. Harvey claims he was "subject to activity and treatment in a derogatory manner" which he "felt was because of [his] race." In particular, Mr. Harvey informed the Executive Vice President for Human Resources that he had been offended by a managing director's e-mail to two other managers referencing Mr. Harvey in a statement, "who does this guy belong to?" (CX A). In his correspondence to the vice president, Mr. Harvey stated, "I am also highly offended by the fact that because of my **Ethnicity** I am now rendered as property by the statement 'belongs to.' I am a human being and a Home Depot employee, not someone's property." (emphasis in the original) (CX A). Mr. Harvey added that he had presented his concerns to other supervisors and persons in the legal department. He wanted to discuss this incident and several other situations with company executives.

On February 27, 2002, due to stress and depression related health issues, Mr. Harvey's doctor placed him on medical leave (CX D-1, CX E-1, and CX L-1). According to Mr. Harvey, at the end of April 2002, his doctor informed Home Depot officials that Mr. Harvey could return to work in about a month but his continued employment in the SSC would be detrimental to him and the company due to his previous treatment at the SSC (CX B).

On May 3, 2002, Mr. Harvey wrote a nine page, single spaced, letter to the Home Depot Board of Directors and Executive Level (CX C⁴ and RX C). In the document, Mr. Harvey presented dozens of examples of violations of the company's ethnic and labor/employment policy. He provided examples of inappropriate loss of jobs, racial discrimination, lack of respect by executives toward company associates, abuse of power, disparate compensation, improper treatment of theft suspects, limited advancement of people without college degrees, and derogatory references to associates' intelligence. In sum, Mr. Harvey believed the "bias, prejudice and abuse of power are getting out of control."

Mr. Harvey also included his personal experiences. Due to the political climate in the SSC, he had been denied promotion. Citing the offensive "belongs to" e-mail, he was disturbed by the human resource personnel's lack of response to his concerns. The vice president for human resources and a senior corporate counsel also had not provided a satisfactory response. Consequently, Mr. Harvey asked the Board to reprimand the manager who sent the e-mail and his supervisors. Additionally, Mr. Harvey observed the low percentage of minorities in senior management positions. To help address the situation, Mr. Harvey recommended that the Board establish a senior vice president position for diversity affairs and employment issues. He also believed the Board should consider creating an advisory associate position. As of the date of his

⁴Unless otherwise indicated, the letters submitted to me by Mr. Harvey are unsigned copies.

letter, Mr. Harvey had not received a response to his physician's recommendation that he not return to the SSC. Consequently, he requested the Board's assistance in facilitating his return to the Washington DC area. In closing, Mr. Harvey asked the Board "to investigate the atmosphere of bias and prejudice that seems permeating from the mid-Atlantic Division SSC and throughout the entire department which also seems to [sic] transgressing throughout the entire company."

About the third week in May 2002, issues developed over Mr. Harvey's extended absence and rights under the Family Medical Leave Act (CX B). He presented his concerns to Home Depot officials.

When he returned to work on May 31, 2002, he was suspended. According to Mr. Harvey, the stated basis for the action was his May 3, 2002 letter of complaint to the Board of Directors (CX J-1). Apparently, for about 30 days, Mr. Harvey remained at home while the company investigated the concerns he raised to the Board of Directors (CX D).

On June 28, 2002, company officials called Mr. Harvey in for a meeting. They indicated that an investigation into his e-mail complaint disclosed that the manager was not being malicious and simply wanted to know who supervised Mr. Harvey (CX D). Mr. Harvey did not believe that reasoning and still considered the reference derogatory. They informed Mr. Harvey that he could not return to his job at SSC and no other job at that salary level was available for him in the mid-Atlantic. (CX D). Mr. Harvey offered to accept an assistant store manager position at a reduced salary. The officials responded that was not an option. They offered to pay for his relocation and assist with an employment agency. When Mr. Harvey mentioned the provisions of his April 2001 settlement contract, the company managers were not aware of its terms. Some time later, in another meeting, a company official indicated Mr. Harvey could return to his old SSC job. Additionally, at that time, the company did not support his return to the DC area. Because of the stress and hostility associated with his former job, Mr. Harvey no longer wanted to return to the SSC. Instead, he indicated they should prepare a separation agreement.

On July 10, 2002, the company presented Mr. Harvey with a separation agreement and an offer of \$7,000 in exchange for an agreement not to sue. However, when he reviewed the separation document, he discovered it contained outdated references, had a suspicious signature, and did not include relocation expenses (CX D and CX J-1). As a result, he did not sign the agreement and continued to ask questions about its contents.

On July 14, 2002, Mr. Harvey again corresponded with the Home Depot Board of Directors (CX D), complaining about the "poor, incomplete and botched" investigation of his concerns set out in his earlier May 3, 2002 letter to the Board. He charged that "Executive Level and Board of Directors are culpable with respect to these violations because after informing everyone about it, nothing happened for two months and now I am being forced out of the company." He recounted his various exchanges with company officials since the end of June 2002 concerning his reemployment and separation agreement. Mr. Harvey emphasized that the company's 2001 proxy statement proclaimed Home Depot did not tolerate disrespectful treatment, discrimination or harassment of any associate. The company indicated that it was developing and implementing programs to promote diversity. Mr. Harvey informed the Board

that he had not seen such programs. He concluded by claiming his experience demonstrated an “atmosphere of malfeasance at the highest levels of Home Depot.”

In another, undated, letter to the Board, Mr. Harvey reiterated his frustrations mentioned in the July 14, 2002 letter (CX E). He then informed the Board of his intention to file charges with the EEOC, DOL, U.S. Justice Department, and the Georgia State Attorney Office. Mr. Harvey was upset that six months after he raised his complaints about the company’s violations and infractions of its code of ethics and his rights, he can’t return to his SSC job or relocate to DC. Instead, he was presented with an outdated separation agreement. As a shareholder, Mr. Harvey also intended to tell his story to institutional shareholders, introduce a proposal to replace members of the Board, and then petition the new Board to replace some associates in senior positions.

In a July 19, 2002 letter to the Home Depot Board of Directors, Mr. Harvey discussed several provisions of the Home Depot ethics guide (CX G). Under the heading, “Shareholders,” the guide indicates employees are to conduct themselves in a manner to “enhance and preserve the reputation of the company and will strive to provide” the company shareholders “a fair return on their investments.” Mr. Harvey charged that the treatment he has received from Home Depot has immensely tarnished the company’s reputation. The ethics code also states individuals who violate its provisions will be disciplined and includes supervisors and executives who condone violations or do not take appropriate measures to correct the problems brought to their attention. In light of that provision, Mr. Harvey asserted the individual who retaliated against him should be disciplined. Mr. Harvey again threatened to write letters to DOL, the Justice Department and the SEC. In the SEC complaint, Mr. Harvey planned to allege that the Board of Directors and Executive Level had engaged in “bad corporate governance” because “of the decisions or lack thereof that led to the retaliation against [him].” This problem “ultimately becomes a fiscal matter because in the end it is going to become a substantial financial liability for the company.” In his complaint to the Attorney General for the state of Georgia, Mr. Harvey would allege violations of his constitutional and civil rights, which included racial profiling and treatment as a criminal. According to Mr. Harvey, this “all occurred because I complained about racial and employment discrimination at the Home Depot.” Mr. Harvey also summarized the handling of his leave of absence and the failure of a company supervisor to comply with the Family Medical Leave Act. “This is another issue I am going to inform Labor Secretary Elaine Chao about.” Finally, after reiterating his intention to obtain a change in the membership of the Board of Directors, Mr. Harvey promised to take his story to the major newspapers.

Around this time frame, Mr. Harvey attempted to exercise a mediation clause in his April 2001 settlement contract and complained to a vice president for human resources (CX F and CX J-1). Eventually, on August 30, 2002, the vice president responded that his allegations had been investigated and were not substantiated (CX K-1).

Between the end of July and the beginning of August 2002, Mr. Harvey returned to Maryland. A few days before August 14, 2002, he received a letter, dated August 9, 2002, from a Home Depot vice president in response to his complaints to the Board (CX J and CX M). The executive summarized that an investigation had disclosed Mr. Harvey had not been mistreated. The vice president then noted that although Mr. Harvey had been informed that he could return

to his job in the Atlanta Store Support Center, he had apparently departed Atlanta and moved back to Maryland. Based on Mr. Harvey's actions, the executive concluded he had resigned his employment with Home Depot. In closing, the executive told Mr. Harvey that if his intentions were misunderstood, he should contact the vice president by August 14, 2002. When Mr. Harvey attempted to contact the executive on August 14, 2002, the vice president was unavailable due to meetings; but, Mr. Harvey left messages indicating many issues remained unresolved.⁵ At the end of the day, the executive returned Mr. Harvey's call and left a message stating they needed to bring closure to the situation. The next day, Mr. Harvey attempted to contact the vice president again but he was on a business trip. On August 16, 2002, Mr. Harvey received a separation notice from Home Depot, completed August 14, 2002, indicating that his employment was terminated effective August 14, 2002 (CX Y and CX Z).

Parties' Positions

Complainant

Mr. Harvey initiated his SOX complaint against Home Depot within 90 days of his August 14, 2002 termination. After the initiation of a SOX action, the statute does not preclude the filing of additional complaints of fraud against the shareholders or violations of other federal laws as an extension or amendment of the original action.

His August 31, 2002 letter to the Secretary of Labor ("Secretary"), constitutes a timely SOX complaint. The statute does not require any specific form for a SOX complaint. Instead, a complainant only needs to present facts which would support his complaint. Mr. Harvey's correspondence satisfies that requirement because he attached multiple documents to the Secretary's letter. Those enclosures provided "detailed issues of fraud and corporate misconduct." He included in his SOX complaint a specific concern about the Family Medical Leave Act. By presenting his letter, Mr. Harvey was informing the Secretary of his "complaints against the board of directors and executives" and requesting the Secretary take action under Federal Labor Law which includes SOX.

Concerning constructive service on the Secretary of a SOX complaint, Mr. Harvey conducted an exchange of correspondence in late spring of 2003 about his previous complaint with various departments within DOL.⁶ At the end of April 2003, he sent essentially duplicate letters to the Assistant Secretary, DOL, and the Director of Occupational Safety and Health

⁵Mr. Harvey also wrote another letter to the Board of Directors, dated August 14, 2002, objecting to the contents in the vice president's August 9, 2002 response (CX I and CX M). He also charged that several members of the Board of Directors were not in compliance with the company's ethics code. I have not included that document in this summarization because the termination notice was completed on August 14, 2002. Consequently, this additional letter to the Board was not a contributing factor to the alleged August 14, 2002 adverse action.

⁶In this portion of his show cause response, Mr. Harvey did not discuss the October 6, 2002 letter to the Assistant Secretary, Employment Standards Administration (CX L-1). He subsequently mentioned this letter in his discussion of correspondence to other federal government agencies. In his letter to the Assistant Secretary, Mr. Harvey explains that after he raised concerns about racial and employment discrimination at Home Depot, he was suspended and then terminated. He also objected to Home Depot's denial of his rights under the Family Medical Leave Act. Mr. Harvey believed Home Depot's actions were illegal.

Administrative (“OSHA”) (CX B-1 and CX C-1) about his earlier complaint and the apparent lack of response from DOL. He received a response in mid-May 2003 from the Director of Enforcement Programs indicating his April 2003 letter had been forwarded to OSHA regional administrator (CX A-1 and CX 1). On May 20, 2003, Mr. Harvey sent letters to the OSHA regional administrator and the OSHA investigator (CX D-1 and CX E-1). In this correspondence, Mr. Harvey provided details about his employment with, and termination by, Home Depot, which led to his filing a SOX whistleblower complaint against the Home Depot leadership. At the end of July 2003, Mr. Harvey sent two additional letters to the regional administrator raising a new SOX concern based on a recent SEC filing by Home Depot (CX D-1). In one letter he also highlighted issues relating to his “complaint under Sarbanes-Oxley that I filed with the Secretary of Labor and other U.S. government agencies last year, which your department started investigating in April/May 2003.” Mr. Harvey received nothing further from OSHA until after he filed his formal November 21, 2003 SOX complaint.

Initially, Mr. Harvey believed the SEC and U.S. Department of Justice (“DOJ”) had jurisdiction over complaints under the recently enacted SOX. As a result, he sent the Chairman of the SEC a complaint about Home Depot on September 16, 2002 charging Home Depot with corporate malfeasance and incompetent corporate governance (CX F-1).⁷ From September 23, 2002 through December 29, 2002, Mr. Harvey sent several additional letters of complaint to various SEC representatives (CX G-1 and CX H-1). On September 23, 2003, he raised another complaint with the Chairman of the SEC concerning a recent security filing by Home Depot (CX N-1). On August 28, 2002 and September 23, 2002, Mr. Harvey wrote letters to the Deputy Attorney General, DOJ, complaining about Home Depot’s practices concerning his former employment (CX I-1).⁸ Finally, between December 6, 2002 and January 21, 2003, Mr. Harvey sent three complaints to the United States Attorney for the Northern District of Georgia, claiming Home Depot’s employment actions had violated his civil rights and alleging other acts of corporate misconduct (CX J-1). On January 6, 2003 and January 21, 2003, Mr. Harvey sent corporate governance complaint letters to the Chairman of the New York Stock Exchange and a member of Congress, respectively (CX M-1 and CX O-1). Although filed with the wrong agencies, Mr. Harvey asserts this correspondence establishes his “expressed intent seeking jurisdiction under SOX.”

Concerning equitable relief from the 90 day filing requirement, Mr. Harvey explains that he filed the November 21, 2003 letter of complaint solely in response to an OSHA investigator’s request. Mr. Harvey believed the OSHA investigator was already evaluating his original complaint. When the investigator told Mr. Harvey to send any more complaints that he still had concerning Home Depot, he sent the November 21, 2003 complaint. Since he started his initial action within 90 days, Mr. Harvey asserts SOX does not preclude consideration of his subsequent November 21, 2003 complaint containing other allegations of fraud and misconduct.

⁷On October 2, 2002, a representative of the SEC acknowledged receipt of his correspondence (CX F-1).

⁸DOJ acknowledged receipt of these letters on October 4, 2002 and October 23, 2002 (CX I-1).

Finally, Mr. Harvey sets out his SOX complaint as follows: “Home Depot’s Board of Directors and Executives terminated me for filing my complaints with them about issues of fraud and corporate misconduct as well for filing with different federal agencies.”

Respondent

Mr. Harvey’s November 21, 2003 SOX complaint is untimely. The alleged adverse personnel action occurred on August 14, 2002. Under the SOX employee protection provisions, a complaint must be filed within 90 days of the adverse personnel action. Mr. Harvey failed to comply with that statutory requirement.

Although Mr. Harvey filed a complaint with the Secretary on August 31, 2002, his correspondence did not constitute a SOX complaint. In that letter, his stated concern was alleged racial and employment discrimination by Home Depot associated with his discharge and application of the Family Medical Leave Act. His race-based discrimination complaint is not a subject for consideration under the SOX employee protection provisions.

The various other documents Mr. Harvey sent to other agencies including DOL do not constitute constructive service on the Secretary. Most of that correspondence was presented more than 90 days after his discharge. The documents submitted to DOL representative filed within 90 days do not contain allegations of employee discrimination prohibited by SOX.

Likewise, the numerous documents that Mr. Harvey sent to other federal agencies within 90 days of his August 14, 2002 termination do not constitute the filing of a proper SOX complaint with an incorrect forum. Significantly, in the correspondence that he presented within 90 days to the various agencies, Mr. Harvey complained about racial discrimination and not retaliation for SOX protected activities. His post-discharge complaints of corporate fraud and misconduct were unrelated to his employment status at Home Depot and his employment termination.

Finally, equitable tolling of the complaint filing requirement is not appropriate in Mr. Harvey’s case. Mr. Harvey has failed to present any facts or circumstances to warrant such equitable relief. As evidenced by his extensive correspondence, Mr. Harvey was well aware of the details surrounding the end of his employment with Home Depot. Additionally, since Mr. Harvey’s complaint is essentially based on alleged racial discrimination, he is unable to establish a *prima facie* case of a SOX violation. Consequently, “there is no legal ground to equitably toll the limitations period. . .”

FINDINGS AND CONCLUSIONS OF LAW

Motion to Dismiss

At this stage of the proceedings, the Respondent’s timeliness objection to Mr. Harvey’s November 21, 2003 SOX complaint and other correspondence represents a motion to dismiss for lack of subject matter jurisdiction. To invoke the investigative and adjudicative processes in the SOX employee protection provisions, a complainant must file his allegation of a violation of the

SOX whistleblower protections within 90 days of the adverse personnel action. Absent any equitable relief, failure to meet the statutory filing deadline precludes consideration of the SOX complaint. See *Roberts v. Rivas Environmental Consultants, Inc.*, 96 CER 1 (ARB Sept. 17, 1997), slip op. at 3-4 (the parties treated the complainant's presentation as a CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act) whistleblower complaint because the Complainant worked at a CERCLA Superfund site. However, the nature of the complaints were not environmental. As a result, the Administrative Review Board ("ARB") concluded that "[u]nder CERCLA, there can be no adjudication on the merits if an alleged discriminatee has failed to submit a complaint alleging CERCLA employee protection violations to the Department of Labor for investigation within the prescribed time period. 42 U.S.C. §9610(b) (1994) and 29 C.F.R. §24.3(c) (1995)." Because the complainant had not satisfied this jurisdictional requirement the ARB declined to review the complaint).

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss, 29 C.F.R. § 18.1 (a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In turn, FED. R. CIV. P. 12 (b) (1), addresses a motion to dismiss for lack of subject matter jurisdiction. The courts recognize two approaches in considering a 12 (b) (1) motion.⁹ Mr. Harvey's case involves consideration of both approaches.

The first consideration of a 12 (b) (1) motion is whether the pleading, or complaint, on its face is sufficient. In reviewing a "facial" motion to dismiss, I consider the allegations in the complaint as true. The second consideration under 12 (b) (1) concerns a factual consideration of the complaint. In this "factual" analysis, no presumption of truthfulness applies to the allegations in the complaint. Instead, I may rely on affidavits and other documents submitted in support of the motion.

With these principles in mind, I will first determine whether dismissal of Mr. Harvey's formal November 21, 2003 SOX complaint due to timeliness is appropriate. Then, I will conduct the same type of inquiry for each respective document, or group of documents, Mr. Harvey filed within 90 days of the adverse personnel action -- his employment termination on August 14, 2002.

November 21, 2003 SOX Complaint

On November 21, 2003, Mr. Harvey sent the Regional Administrator, DOL, a letter to "file a complaint under the Corporate Accountability Act of 2002 (Sarbanes-Oxley) against my former employer the Home Depot, Inc. and as a current stockholder about issues with the enclosed SEC Schedule 14A Definitive Proxy Statement." In this complaint, he expressed some concerns about the Board of Directors and presented one specific complaint about lawyers representing the company.

Concerning his Board of Director issues, Mr. Harvey first objected to the company's practice of reimbursing spouses of the directors who attend corporate functions. Since the stockholders had not elected the spouses, Mr. Harvey questioned the propriety of their being

⁹See *Ohio National Life Insurance Co. v. United States*, 922 F.2d 320 (6th Cir. 1990).

compensated by the company. According to Mr. Harvey, this reimbursement practice constituted “poor corporate governance, chicanery, and malfeasance.” Next, Mr. Harvey questioned whether the Board had the capacity and commitment to govern itself. He was particularly troubled by a responsibility/liability disclaimer for the directors set out in corporate documents. He also expressed his doubt that the Home Depot Board of Directors was capable of ensuring the integrity of the company’s financials.

In regards to an attorney representing Home Depot in a grievance proceeding initiated by Mr. Harvey, he claimed the lawyer had made false representations about Mr. Harvey’s case. Mr. Harvey summarized the basis for his bar association grievance: suspicious signatures on official corporate filings and the uncertainty about whether a company lawyer had a power of attorney to sign a document for an executive vice president. Mr. Harvey also objected to counsel’s claim that Mr. Harvey was harassing Home Depot and its employees.¹⁰ To support his complaint on this issue, Mr. Harvey attached the attorney’s grievance response (CX Q). In that attachment, Home Depot’s counsel mentioned that Home Depot terminated Mr. Harvey’s employment, effective August 14, 2002.

Facially, even if I accept all those allegations as true, Mr. Harvey’s complaint still fails to confer subject matter jurisdiction on the Office of Administrative Law Judges. As set out in the bar grievance response, the only adverse personnel action Home Depot took against Mr. Harvey after the July 30, 2002 effective date of SOX was his August 14, 2002 termination. That adverse action started the 90 day complaint filing clock. Once the time filing requirement started to run, Mr. Harvey had until about November 13, 2002 to file an employee protection SOX complaint. However, Mr. Harvey did not send a formal SOX complaint to DOL until over a year later, on November 21, 2003. Consequently, facially, Mr. Harvey’s November 21, 2003 SOX complaint is untimely and must be dismissed due to a lack of subject matter jurisdiction.¹¹

Since his November 21, 2003 SOX complaint is untimely on its face, the SOX proceedings before OALJ may continue only if Mr. Harvey establishes subject matter jurisdiction through some other means. Based on the documents presented to date, and as outlined in the February 5, 2004 Show Cause Order, four other methods exist which may permit Mr. Harvey to demonstrate compliance with the requirement to file a SOX complaint within 90 days of his August 14, 2002 employment termination, establishing the requisite subject matter jurisdiction in his case: a) some other timely complaint to the Secretary of Labor; b) constructive service of a timely complaint on the Secretary of Labor; c) the filing of a timely SOX complaint albeit in an incorrect forum; or, d) the existence of circumstances which indicate that application of the 90 day filing requirement would not be equitable in Mr. Harvey’s case.

¹⁰Mr. Harvey subsequently filed another SOX complaint concerning this issue. That SOX complaint is also before me as 2004 SOX 36.

¹¹Significantly, since Mr. Harvey also failed to present any adverse employment action in retaliation for alleged protected activity under SOX, the complaint also facially fails to state a cause of action and is subject to dismissal under FED. R. CIV. P. 12 (b) (6).

Correspondence to the Secretary of Labor

Between August 14, 2002 and November 13, 2002, Mr. Harvey sent three letters to the Secretary. Since that correspondence was submitted within 90 days of his termination, Mr. Harvey will have satisfied the jurisdictional time filing requirement if one, or more, of those letters constitutes a complaint under SOX. In evaluating whether his correspondence with the Secretary represented a complaint under SOX, I first note that the implementing regulation, 20 C.F.R. § 1980.103 (b) states that no particular form is required for a SOX complaint. However, the written complaint must contain a “full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” *See also Aurich v. Consolidated Edison Co. of New York, Inc.*, 86-CAA-2 (Sec’y Apr. 23, 1987) (the substance of the complaint determines whether activity is protected under the particular statute at issue) and *Wilkinson v. Texas Utilities*, 92-ERA-16 (Sec’y July 13, 1993) (when the complainant did not raise any safety issues concerning the respondent’s operation of a nuclear power plant, but rather insisted that the employer had discriminated against her on the basis of her sex, the complainant failed to state a violation of the ERA’s employee protection provision). Thus, to determine whether an alleged violation relates to SOX and constitutes a viable SOX complaint, a review of the SOX statute and the behavior it regulates is necessary.

Subsection 1514A (a) of the Act and 29 C.F.R. § 1980.102 of the implementing interim regulations prohibit a company with either a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781, or that is required to file reports under section 15 (d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o (d)) from discharging, demoting, suspending, threatening, harassing or in any manner discriminating against an employee in the terms and conditions of employment because an employee engaged in any lawful act to provide information, cause information to be provided, or otherwise assist in an investigation, regarding any conduct the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), or any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders, when the information is provided to a federal regulatory or law enforcement agency, any member of congress, or a person with supervisory authority over the employee.

Further, by reference,¹² SOX incorporates the procedural provisions and rules of the employee protection provisions of the Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121 (b). According to 49 U.S.C. § 42121 (b) (2) (B) (iii) and 29 C.F.R. § 1980.109 (a), a violation of SOX employee protection provision will be established if the complainant establishes through the preponderance of the evidence that his protected activity was a contributing factor in the alleged unfavorable personnel action. That is, the complainant must prove that:

1. He engaged in a protected activity or conduct under the Act;
2. The respondent knew the complainant engaged in the protected activity;

¹²18 U.S.C. § 1541A (b) (2) (A).

3. He suffered an unfavorable personnel action; and,

4. The protected activity was a contributing factor in the respondent's decision to take the unfavorable personnel action.¹³

In light of these various provisions, a SOX complainant must provide sufficient facts to at least minimally raise the possibility that a) the complainant engaged in a protected activity involving one of the specified violations identified in SOX; b) the employer was aware of the protected activity; and, c) the complaint suffered an adverse personnel action. Clearly, Mr. Harvey's loss of employment on August 14, 2002 represents an adverse personnel action. Additionally, Mr. Harvey's statements indicate almost all of his reports of violations and concerns were known by his supervisors, Home Depot executives, and the Board of Directors.

In regards to protected activities, a fundamental protected activity under SOX, and the activity most relevant in Mr. Harvey's case, involves an employee providing information to supervisory authority based on a reasonable belief that a SOX violation has occurred. Under the statute, 18 U.S.C. § 1514A (a) (1), a SOX violation must relate to at least one of the following specific categories:

1. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1341, Frauds¹⁴ and swindles. This provision establishes that use of the Post Service or private or commercial interstate carrier as a means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

2. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1343, Fraud by wire, radio, or television. This provision establishes that use of wire, radio, or television communication as means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

3. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1344, Bank fraud. This provision establishes that executing a scheme or artifice to defraud a financial institution is a felony crime punishable by not more than thirty years imprisonment.

4. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1348, Securities fraud.¹⁵ This provision establishes that executing a scheme or artifice a) to defraud any person in

¹³Although not pertinent in consideration of the Motion to Dismiss, I note that in the actual adjudication of a SOX complaint, even if the complainant proves that his protected activity was a contributing factor in the unfavorable personnel action, 49 U.S.C. § 42121 (b) (2) (B) (iv) and 29 C.F.R. § 1980.109 (a) state no relief is available to the complainant if the respondent proves by clear and convincing evidence that it would have taken the same unfavorable personnel action even in the absence of any protected activity.

¹⁴Fraud is defined as "false representation of a matter of fact. . .which is intended to deceive another so that he will act upon it to his legal injury." BLACK'S LAW DICTIONARY 788 (4th ed. 1968).

¹⁵This criminal provision was added by Section 807 of the Sarbanes-Oxley Act (2002).

connection with any security of an issuer of a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15 (d) of the Securities Exchange Act; or b) to obtain by means of false or fraudulent pretenses any money or property in connection with the purchase of such security identified in a) above is a felony crime punishable by not more than twenty-five years imprisonment.

5. Any rule or regulation of the Securities Exchange Commission.
6. Any provision of federal law relating to fraud against shareholders.

Accordingly, in evaluating Mr. Harvey's correspondence to the Secretary of Labor, and other entities, I will focus on whether he presented sufficient information to demonstrate that he presented issues to Home Depot involving at least one of the specified SOX violations.

A. August 31, 2002 Letter

On August 31, 2002, Mr. Harvey wrote a letter to the Secretary of Labor, with a courtesy copy to the Assistant Secretary, alleging that Home Depot had committed violations of "Federal Labor Laws, as well as constitutional, first amendment, civil rights and Title VII. . ." (RX B). First, after sending a letter of complaint to the CEO, Board of Directors, and other executives about the company's "racial and employment discriminatory practices," Mr. Harvey was suspended from work and told that he would be terminated. Second, Mr. Harvey suspected an executive's signature on a separation agreement given to him was fraudulent. Third, the separation agreement offered Mr. Harvey \$7,000 in exchange for his right to sue under Title VII. Fourth, on at least one occasion, when he was attempting to resolve his employment situation, the company executives in July 2002 made Mr. Harvey wait outside the office building in the heat. Fifth, Home Depot improperly handled his application under the Family Medical Leave Act. Mr. Harvey believed that his complaint to an executive about his leave problem was partially the cause for his eventual termination from employment. Sixth, Mr. Harvey complained about Home Depot requiring individuals to take vacation and personal time to help reduce weekly payrolls. Seventh, Home Depot terminated Mr. Harvey even though he attempted to comply with a vice president's request to clarify his employment intentions by a certain date. In closing, Mr. Harvey explained the purpose of his letter was to inform the Secretary how minority associates, such as himself, were being treated by Home Depot for voicing their concerns to company executives and the Board of Directors.

In reviewing Mr. Harvey's letter, I first note that his general allegation of federal labor law violations, absent specific details, does not establish a viable complaint relating to the employee protection provisions of SOX even though SOX may be considered a federal labor law. Mr. Harvey establishes a SOX complaint with this letter only if the specific factual allegations may reasonably be considered to fall within the six SOX specified categories of protected activities. In that regard, clearly none of Mr. Harvey's specific allegations relate to mail fraud, wire fraud, bank fraud or securities fraud. Likewise, his allegations do not point to violations of SEC rules and regulations, which regulate the issuance of, and transactions involving, the securities of publicly traded corporations.

With the elimination of the other SOX violation types, the sole remaining SOX violation category concerns federal law relating to fraud against shareholders. For the following reasons, I conclude each of Mr. Harvey's specific allegations fail to reasonably demonstrate that Mr. Harvey had reported this type of violation to Home Depot officials thereby engaging in a SOX protected activity.

In his May 2002 complaint to the Board of Directors, Mr. Harvey presented concerns about two types of racial discrimination, systemic and individual. In regards to Home Depot in general, Mr. Harvey suggested that that racial discrimination may be broad based and provided two examples. First, he recounted how the low percentages of minority store managers in the Maryland area had raised the potential for a significant law suit. However, he noted the situation was resolved when Home Depot investigated the situation and entered into settlements with the parties. Second, Mr. Harvey expressed his concern that only three minorities had achieved the position of vice president within the company.

In terms of a federal law concerning fraud against shareholders, the first example does not represent a complaint at all. Although a discrimination problem may have existed in Maryland at one time, Mr. Harvey essentially recounted to the Board of Directors that Home Depot responded and resolved the situation. In regards to his second example, Mr. Harvey's observation about the low number of minority vice presidents, absent any other information, did not represent a reasonable belief that Home Depot had systematically discriminated against minorities seeking vice president positions. Consequently, I find neither example was a reasonable complaint of systemic racial discrimination.

The second type of employment and racial discrimination problem Mr. Harvey presented to the Board of Directors, and clearly his principal concern, concerned individual discrimination, including several personal experiences. In determining whether these alleged violations of individual employment rights involve a federal law related to fraud against shareholders, an implicit argument may be made that a company which permits discriminatory practices despite its public policy of equal opportunity is acting contrary to the best interests of its share holders. While that argument has understandable appeal, a SOX protected activity must involve an alleged violation of a federal law directly related to fraud against share holders. In this case, the federal law actually prohibiting individual employment discriminatory practices, Title VII, is based on individual rights and establishes procedures to address illegal employment discrimination; it was not enacted to preclude fraud against shareholders. In contrast, a federal law directly linked to the prevention of fraud against shareholders is the SOX statute itself. As set out in the SOX preamble, Congress imposed additional, specific legal requirements and standards on corporations, directors, senior financial officers, lawyers, and accountants to protect shareholders by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws and for other purposes. For example, SOX includes Section 302 (corporate officer certification that a financial disclosure is accurate and does not contain any untrue statement of material fact), Section 401 (enhanced disclosure requirements for mandated financial reports), and Section 406 (code of ethics for senior financial officers).

I have also considered another reasonable argument that since SOX mandates the accuracy of corporate disclosures, a reported incident of racial discrimination within a publicly

traded company that represents itself to be non-discriminatory may amount to violation of a SOX disclosure requirement and thus involve a federal law related to fraud against shareholders. That is, although the racial discrimination is prohibited by a different federal law, its existence may also adversely affects the accuracy of corporate disclosures mandated by SOX, which is a federal law concerning fraud against shareholders.

While this presentation also has some logical appeal, the connection becomes tenuous upon close examination of SOX. Specifically, Section 302's requirement for the accuracy of material facts relating to finances, demonstrates Congress' intention to protect shareholders by requiring accurate reporting of a corporation's financial condition. The two key components are accurate accounting and financial condition. Whether a supervisor's acts of individual discrimination comply with the company's stated equal opportunity standards has a very marginal connection with those two components. Perhaps, the failure to disclose a class action lawsuit based on systemic racial discrimination with the potential to sufficiently affect the financial condition of a corporation might become the subject of a SOX protected activity if an individual complained about the failure to disclose that situation.¹⁶ However, individual, rather than systemic, discrimination does not reach that materiality threshold in terms of a corporation's financial condition. Alleged individual violations of Title VII would not fall into the category of SOX mandated disclosures. Further, Mr. Harvey's particular discrimination complaints to supervisors and the Board of Directors centered on the alleged existence of racial and employment discrimination rather than the company's failure to report such discrimination to the public.

Accordingly, for the reasons discussed above, I conclude Mr. Harvey's complaints of individual racial and employment discrimination, the alleged inappropriate separation agreement, adverse treatment outside the office building, and inability to contact the vice president as requested do not involve violations of federal laws addressing fraud against shareholders. Similarly, Mr. Harvey's Family Medical Leave Act and employee leave practice complaints do not represent a violation of a shareholder fraud federal law.

Mr. Harvey does raise a specific fraud allegation with regard to the signature on the separation agreement. However, while that allegation might give him a civil cause of action or possibly violate other laws precluding individual fraud, it still does not involve a violation of federal law which protects shareholders themselves from fraud.

Finally, in his letter to the Secretary, Mr. Harvey states that he is enclosing several documents concerning his employment with Home Depot. One of those documents is Mr. Harvey's July 14 letter to the Board of Directors (CX D). For the sake of completeness, I will also address an issue Mr. Harvey presented to the Board of Directors in that July 14, 2002 letter that he did not specifically identify to the Secretary in the body of the August 14, 2002 letter.

In the July 14, 2002 letter to the Board of Directors, Mr. Harvey charged Home Depot with corporate malfeasance. As an example, Mr. Harvey noted that the company's 2001 proxy

¹⁶Again, as previously discussed, I have concluded in this case that Mr. Harvey's two examples of company-wide discrimination were not viable complaints of systemic discrimination. Likewise, his complaints in that area did not involve Home Depot's failure to report these situations to shareholders.

statement indicated Home Depot did not tolerate discrimination and was developing and implementing programs to promote diversity. Based on his personal experience and his lack of knowledge of any diversity programs, Mr. Harvey challenged the accuracy of the company's representations, indirectly charging Home Depot with a SOX disclosure violation. Assuming proxy statements are regulated by SOX, the particular financial document in this case, the 2001 proxy appears to have been published prior the July 20, 2002 effective date of SOX. As a result, SOX did not impose an accuracy mandate on the 2001 proxy statement. Additionally, as I have already discussed above, alleged individual acts of discrimination do not rise to the level of financial materiality envisioned by SOX which would require disclosure in the proxy or even impeach Home Depot's statement of non-tolerance. Finally, even if SOX were applicable to the proxy statement, Mr. Harvey's challenge to the company's claim of diversity programs was not reasonable. Notably, the 2001 proxy statement indicates such programs were in the development and implementation stages. In light of these two stages and considering his extensive absence from the company in the spring of 2002, Mr. Harvey's unfamiliarity with such programs at the Atlanta SSC does not reasonably demonstrate the company's representation about the programs is false.

In conclusion, while Mr. Harvey may have presented several labor law concerns to the Secretary, particularly in the area of employment discrimination practices, his August 14, 2002 letter did not contain sufficient facts to establish the incidents were related to one of the six SOX violations such that he had engaged in a protected activity under SOX. As a result, Mr. Harvey's August 31, 2002 correspondence to the Secretary was not a SOX complaint.

B. September 20, 2002 Letter

On September 20, 2002, Mr. Harvey sent the Secretary a second letter containing a wage and hour complaint (CX L-1). Specifically, Mr. Harvey alleged that over the course of years, while working in Maryland, he was aware of Home Depot's practice in certain areas to ask workers to work more than 8 hours a day but then have them reduce their hours later in the week to cut the overtime hours. He recently discovered the practice was continuing and believed it was illegal.

Although Mr. Harvey's complaint may involve federal wage and hours laws, Home Depot's alleged overtime practice does not involve a violation in any of the six SOX categories. Additionally, in this particular letter, Mr. Harvey did not allege that he presented this concern to Home Depot while employed in Atlanta or that it was a contributing factor to his termination. Accordingly, Mr. Harvey's second letter to the Secretary was not a SOX complaint.

C. November 1, 2002 Letter

In his November 1, 2002 letter to the Secretary, Mr. Harvey expressed his frustration with the response he had just received from the Employment Standards Administration ("ESA"), Wage and Hour Division, DOL, concerning his earlier Family Medical Leave Act complaint (CX L-1). He had been advised that DOL did not know the specifics of his complaint. ESA instructed Mr. Harvey to contact the Baltimore District Office if he still believed his leave rights had been denied. Mr. Harvey stressed that since the Act required the Secretary to investigate

these issues, he had sent everything to her. He objected to having to start over. Mr. Harvey emphasized the DOL should be made aware of Home Depot's "kind of racially discriminatory activity and employment discrimination practices." He again asked the Secretary to investigate the numerous violations of federal labor laws and take the necessary action.

Since this letter did not raise any new complaints, and based on previous comments concerning the two earlier letters, Mr. Harvey's November 2, 2002 correspondence to the Secretary is not a SOX complaint.

Summary

In summary, none of the three letters Mr. Harvey submitted to the Secretary during the 90 days following his termination of his employment on August 14, 2002 contained specific factual allegations of violations relating to the six specific categories established by SOX as the subjects for protected activity. Consequently, the three letters to the Secretary during this period were not SOX complaints.

Constructive service on the Secretary

Although Mr. Harvey did not submit a timely SOX complaint directly to the Secretary, he did send one letter to another agency within with DOL between August 14, 2002 and November 13, 2002 (the end of the 90 day period).¹⁷ Depending on its content, that letter may constitute constructive timely service of a SOX complaint on the Secretary.

October 6, 2002 Letter to Assistant Secretary

On October 6, 2002, Mr. Harvey sent the Assistant Secretary of Labor, ESA, a letter containing several allegations against Home Depot which had recently entered into a National Business Partnership Program Agreement (CX L-1). Mr. Harvey wanted DOL to know that the Home Depot Board of Directors and Executive Level had condoned and permitted numerous violations of Federal labor laws. Mr. Harvey charged that after presenting his concerns about racial and employment discrimination to the Board of Directors, he was suspended. To establish his complaint, Mr. Harvey attached his May 2, 2002 letter to the Board of Directors. Additionally, Mr. Harvey expressed his concerns over the terms of the proposed separation agreement and the authenticity of an executive's signature; he enclosed a copy of the agreement. Next, Mr. Harvey alleged violations of the Family Medical Leave Act. He attached the related leave forms. Next, Mr. Harvey objected to his treatment by executives in July 2002, which led to his standing outside the office building in the heat. Then, Mr. Harvey recounted the discriminatory wage and hour issues that had led to his April 2001 contract settlement with Home Depot and expressed his belief that the practices continued. Finally, Mr. Harvey stated that he had been terminated on August 14, 2002, even though he had tried to comply with the vice president's August 9, 2002 instructions.

¹⁷The other letters to various DOL entities including the Assistant Secretary of Labor (CX B-1), OSHA (CX C-1 and CX E-1), and the Regional Administrator (CX D-1) were sent by Mr. Harvey after November 13, 2002.

The contents of this letter parallel Mr. Harvey's earlier August 31, 2002 letter to the Secretary. Consequently, my previous determinations concerning the racial discrimination, treatment by the executives in July 2002, the inability to contact the vice president as instructed, the settlement agreement issues, wage and hour concerns, and his Family Medical Leave Act complaints, also apply to this letter. These complaints do not involve SOX protected activities.

Summary

Since the October 6, 2002 letter to the Assistant Secretary did not contain incidents involving the six SOX violations, it does not establish constructive service on the Secretary of a timely SOX complaint.

SOX complaint in wrong forum¹⁸

As Mr. Harvey explained, since SOX was a new statute in the late summer of 2002, he believed the SEC and DOJ were the lead agencies in handling SOX complaints. In light of that representation, his correspondence to those two agencies may serve as a timely SOX complaint.

A. SEC Correspondence¹⁹

On September 16, 2002, Mr. Harvey sent a letter to the SEC alleging corporate malfeasance and incompetent corporate governance by the Home Depot's Board of Directors (CX F-1). Mr. Harvey reviewed the April 2001 discrimination settlement and summarized his subsequent complaints of racial and employment discrimination to his supervisors and the Board of Directors and described the circumstances of his termination. He expressed his concerns about the separation agreement; the executive's signature; and the company's overtime practices. According to Mr. Harvey, Home Depot's negligent and incompetent handling of its legal responsibilities represented a severe liability for the company. Mr. Harvey then claimed a published June 2002 interview with the company's CEO raised disclosure issues and ethical concerns for the Board of Directors. Finally, Mr. Harvey charged that the 2001 proxy document contained false statements because in his nine years with Home Depot, he had never heard of a diversity program. To further support his charge, Mr. Harvey observed the lack of minorities at all management levels. Prior to taking his concerns to the company's shareholders, Mr. Harvey

¹⁸Because Mr. Harvey presented the following letters after the expiration of the 90 day time limit, I have not included the correspondence in this discussion: January 6, 2003 letter to the Chairman, New York Stock Exchange (CX M-1) and January 21, 2003 letter to the chairman of a congressional committee (CX O-1).

¹⁹On September 25, 2002, Mr. Harvey sent a letter to the SEC Complaint Center because he had recently learned that the company's CEO was purchasing expensive cars for several executives (CX G-1). I have not included this correspondence since it did not involve a complaint Mr. Harvey made while he was working for Home Depot. Also, I have not included Mr. Harvey's November 30, 2002 follow-up letter and additional exhibits submitted to the SEC because the documents are primarily untimely (CX H-1). In this letter, he raised new allegations about Chairman of the New York Stock Exchange who also sat on the Home Depot Board of Directors and charged the Home Depot legal department with "thievery, skullduggery, and issuance of fraudulent documents." I have omitted Mr. Harvey's December 12, 2002 complaint regarding a November 2002 SEC filing by Home Depot and September 12, 2003 complaint about an April 2003 SEC filing since those events occurred after the termination of his employment with Home Depot (CX H-1 and CX N-1).

asked the SEC to “take whatever action permissible under new and existing corporate governance rules and laws of the SEC.”

I have previously addressed most of Mr. Harvey’s stated concerns in this letter and found them to be unconnected to the six areas of SOX violations. In regards to the CEO interview, Mr. Harvey did not raise that issue to his supervisors or the Board of Director prior to his separation, thus his concern about the interview did not play a role in his employment termination. Consequently, Mr. Harvey’s September 16, 2002 letter to the SEC was not a timely complaint of a violation of the SOX employee protection provisions.

B. DOJ Correspondence²⁰

On August 28, 2002, Mr. Harvey sent a letter to the Deputy Attorney General asserting Home Depot had violated his “constitutional, civil, first amendment, and Title VII rights. . .” (CX I-1). Mr. Harvey attached his May 2002 complaint of racial and employment discrimination to the Board of Directors and described the circumstances of his employment termination. Mr. Harvey highlighted concerns about the separation agreement, his treatment in July 2002 outside the office building, and his inability to contact the vice president prior to termination. He also attached two other letters to the Board of Directors. He requested action be taken under appropriate “federal, corporate fraud, and civil rights laws. . .”

Again, based on my previous determinations, Mr. Harvey’s letter to the Deputy Attorney General does not represent a timely SOX complaint.

Summary

Neither his correspondence to the SEC nor DOJ contained allegations that involved the six SOX violations. Therefore, Mr. Harvey did not present a timely SOX complaint to either agency.

Equitable Relief

Because I have determined Mr. Harvey’s submissions to DOL, SEC and DOJ, albeit timely, did not address the six specified SOX violations, and thus are not SOX complaints, Mr. Harvey may avoid dismissal of his remaining November 13, 2003 SOX complaint only if some equitable reason exists to relieve Mr. Harvey of the 90 day time limit for filing a SOX complaint.

Since the time filing requirement in SOX, 18 U.S.C. §1514A (b) (2) (D) is set out as a statute of limitations, the principle of equitable tolling applies. *See School District of City of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981) and *Lastre v. Veterans Administration Lakeside Medical Center*, 87 ERA 42 (Sec’y Mar. 31, 1988), slip op. at 2-4. Generally, tolling of the statute of limitations filing requirement may be appropriate if: a) the respondent misled

²⁰I have not included the following three letters Mr. Harvey submitted after November 13, 2002 to the United States Attorney for the Northern District of Georgia: December 6, 2002, January 2, 2003, and January 21, 2003 (CX J-1). Also, for the same reason discussed in footnote 19, I have not included Mr. Harvey’s September 23, 2002 complaint about the executives’ expensive cars (DX I-1).

the complainant as to the cause of action; b) the respondent prevented the complainant from presenting a timely complaint; or c) the complainant timely filed the exact type of claim in the wrong forum.²¹ *Lahoti v. Brown & Root*, 90 ERA 3 (Sec’y Oct 26, 1992). On the other hand, tolling is not appropriate on the basis that the complainant was not aware of his rights under the federal employee protection provisions. *Id.*

With these principles, in mind I turn to Mr. Harvey’s response to the Show Cause Order which offers three possible equitable considerations. First, Mr. Harvey believed he had complied with the SOX statute of limitations by submission of letters to the SEC, DOL, and DOJ. However, his incorrect belief that these letters constituted SOX complaints doesn’t warrant a waiver of the 90 day time limit for the November 21, 2003 formal SOX complaint.

Second, and closely related, Mr. Harvey asserts that his November 21, 2003 SOX complaint should be considered because it is merely a continuation of the SOX action he initiated in a timely manner following his August 14, 2002 employment termination. Contrary to Mr. Harvey’s position, I have determined his correspondence during the 90 day period after his termination did not initiate a SOX action. Consequently, his November 21, 2003 SOX complaint stands alone and the earlier filings do not justify waiving the statute of limitations for this last complaint.

Third, Mr. Harvey claims that he filed the formal November 21, 2003 SOX complaint at the request of the OSHA investigator. As a result, his otherwise timely submissions to the Secretary of Labor, SEC, and DOJ should not be negated because he also subsequently filed an untimely formal SOX complaint in November 2003. I determined that the earlier submissions were not SOX complaints based on their respective content and did not base the decision on Mr. Harvey’s subsequent untimely filing of the November 21, 2003 complaint.

In his response, Mr. Harvey did not allege that Home Depot either mislead him or precluded him from filing a timely SOX complaint. Accordingly, no permissible equitable grounds exist to waive the SOX complaint 90 day statute of limitations.

Additional Comment

In light of Mr. Harvey’s pre-hearing submission, I believe one other comment is warranted. Mr. Harvey indicated that he intended to pursue numerous issues at the hearing. The extensive list of issues included: whether the Home Depot Board of Directors committed fraud by reimbursing the travel expenses of the director’s spouses to attend official company functions and visit company stores; whether the Board of Directors is capable of ensuring the integrity of company financials; whether the Board of Directors bribed a political organization to endorse Home Depot as a choice for minorities; whether certain SEC forms were actually signed by the indicated executive; whether the vice president designated as the reporting person has the competence to practice before the SEC; and, whether the various committee meetings were held separate from the Board of Directors’ meeting, as required. I simply note that had the Motion to Dismiss not been granted, the hearing before me would have only addressed Mr. Harvey’s

²¹I have already discussed the third possibility and determined it is not available since Mr. Harvey’s complaints to SEC and DOJ did not contain SOX violations.

employment relationship with Home Depot and whether any SOX protected activity contributed to the severance of that relationship. The proceedings would only tangentially consider his extensive corporate malfeasance allegations to the extent necessary to determine whether Mr. Harvey's complaints to supervisors and the Board of Directors were based on a reasonable belief that a violation of one, or more of the SOX violation categories had occurred.

CONCLUSION

Facially, since he did not file the complaint within 90 days of his August 14, 2002 separation from Home Depot, Mr. Harvey's November 21, 2003 SOX complaint is untimely. Because the referenced incidents in his correspondence to the Secretary of Labor and other entities within DOL did not relate to the six specific SOX violations, his submissions between August 14, 2002 and November 13, 2002 were not SOX complaints. For the same reasons, Mr. Harvey's correspondence to the SEC and DOJ within the same time frame were not SOX complaints. Finally, Mr. Harvey has not presented sufficient facts to warrant an equitable suspension of the 90 day complaint filing requirement. Since Mr. Harvey failed to file a viable complaint within the time frame mandated by 18 U.S.C. § 1514 A (b) (2) (D), his complaint of a violation of the Sarbanes-Oxley Act's employee protection provision must be dismissed.

ORDER

Accordingly, Mr. Harvey's November 21, 2003 SOX complaint is **DISMISSED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: May 27, 2004
Washington, D.C.

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate

Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).